Supreme Court, U.S.
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No. 93-010

In The

Supreme Court of the United States

October Term, 1993

MARK T. CULLEN,

Petitioner,

vs.

TRAINOR, ROBERTSON, SMITS & WADE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF IN OPPOSITION FOR RESPONDENTS TRAINOR, ROBERTSON, SMITS & WADE AND CHARLES TRAINOR, STUART SMITS, WILLIAM DAVIS, DAVE ROBERTSON AND GARY FUNAMURA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of California's statute of limitations for actions against an attorney for legal malpractice set forth in the Code of Civil Procedure § 340.6 is constitutional as it allegedly violates due process by being vague as to the meaning of actual injury.

2. Whether a partnership is a separate legal entity, and if so, should a partnership cause of action be differentiated from an individual cause of action as it relates to the statute of limitations for actions for legal malpractice under Code of Civil Procedure § 340.6?

3. Whether Petitioner has been denied due process and equal protection of the law since the lower courts have barred Petitioner from bringing a cause of action for intentional misrepresentation against Respondents.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Statement of Jurisdiction 1

Restatement of the Case 3

Summary of Argument 9

Reasons for Denying the Writ 10

I. Corrections to Misstatements of Fact. 10

II. Petitioner has not been deprived of his right to due process. 11

A. Legal Malpractice Claim. 11

B. Cullen Development Company Was Not A Separate Legal Entity From Its Partners. 16

C. Intentional Misrepresentation Claim. .. 19

Conclusion 22

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Budd v. Nixen, 6 Cal. 3d 195 (1971) (98 Cal. Rptr. 849) .. 14, 15

Derose v. Carswell, 196 Cal. App. 3d 1011 (1987) 15

Evans v. Galardi, 16 Cal. 3d 300 (1976) 18, 19

Fazzi v. Peters, Cal. 2d 590 (1968) 19

First Nat. T&S. Bank v. Industrial Acc. Com., 213 Cal. 322 (2 P.2d 347, 78 A.L.R. 1324), 9 Cal. L. Rev. 1190 18

Johnson v. Simonelli, 231 Cal. App. 3d 105 (1991) 13, 14

Laird v. Blacker, 61 U.S.L.W. 3418, 2 Cal. 4th 606 (1992) 9, 15, 19

Marshall v. International Longshoremen's & Warehousemen's Union, 57 Cal. 2d 781 (1962) 18

Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176 (98 Cal. Rptr. 837) (1971) 14

Miller v. Lakeside Village Condominium Assn., Cal. App. 4th 1611 (1991) 15

Reed v. Industrial Accident Com., 10 Cal. 3d 191 (1937) . 18

Contents

Page

Robinson v. McGinn, 195 Cal. App. 3d 66 (240 Cal. Rptr. 423) (1987) 14

Stoll v. Superior Court, 9 Cal. App. 4th 1363 (1992) 22

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) 2

Statutes Cited:

28 U.S.C. § 1257(a) 2

28 U.S.C. § 1257(3) 2

California Codes of Civil Procedure:

§ 338 .....7, 21, 22

§ 340 15

§ 340.6 .....i, 7, 8, 9, 12, 19, 21

§ 369.5(b) 16

§ 388 16

§ 1049 8

§ 1908 ..... 6, 17

§ 1908(2)(b) 17

Contents

Page

California Corporations Code:

§ 15013 16

§ 15014 16

§ 15015 ..... 6, 16

§ 15025(1) 18

Other Authorities Cited:

Witkin, *California Procedure, "Actions,"* section 309, p. 338 (3rd Ed. 1985) 19

Witkin, *Summary of California Law, "Partnership"*, section 15, p. 412 (9th Ed. 1989) 18

APPENDIX

Appendix A — Letter from William K. Suter of the Supreme Court of the United States Dated June 28, 1993 ..... 1a

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STATEMENT OF JURISDICTION

MARK T. CULLEN (hereinafter referred to as "Petitioner") is requesting that this Court issue an order granting a writ of certiorari to review the decision of the Supreme Court of the State of

California, filed on March 31, 1993, denying Petitioner's petition for review of the decisions of the California Court of Appeals, Third Appellate District, per Justice Blease, concurred with unanimously by Presiding Justice Puglia and Justice Scotland, filed on January 4, 1993, and February 1, 1993.

Petitioner contends this Court has jurisdiction to review the decision of the California Supreme Court pursuant to 28 U.S.C. § 1257(3). Section 1257 does *not* contain a subdivision 3 as he cites. Presumably, Petitioner is referring to § 1257(a) which provides in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of state in which a decision could be had, *may* be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States. [Emphasis added.]

A review of the decisions of the Third District Court of Appeals for the State of California and the California Supreme Court demonstrates that no substantial federal question was presented to those courts by Petitioner. Litigants who seek to bring cases to the United States Supreme Court from state court must present federal issues in the state court system first. *Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981).

The "Questions Presented For Review" as phrased and briefed by Petitioner also fail to raise any *substantial* federal issue for review by this Court. In particular, Petitioner's question as to

whether a partnership is a separate legal entity is a glaring example of the nonfederal issues presented for review by this writ.

The Court, out of hand, should deny the petition for lack of jurisdiction.

RESTATEMENT OF THE CASE

For purposes of this brief and the sake of brevity, this summary is confined to only those facts pertinent to the issues presented in Petitioner's petition for writ of certiorari.

This petition arises out of an action by Petitioner's *verified* further first amended complaint for legal malpractice and other related causes of action against Respondents relating to Respondents' prior representation of Petitioner in the underlying case of *Housing Authority of the County of Sacramento v. James Cullen, Mark T. Cullen, and Richard Cullen, dba Cullen Development Company,* Sacramento County Superior Court Case No. 331596, filed on or about July 22, 1985. The underlying action for damages arose from a breach of construction contract between the parties.

In the underlying action, *Petitioner was sued individually and as a partner of Cullen Development Company,*[1] a general partnership, by the Housing Authority of the County of Sacramento (hereinafter referred to as "Housing Authority"). Petitioner was the "qualifying" and managing general partner for Cullen Development Company (hereinafter "Cullen Development"). In this capacity, Petitioner was responsible for

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1. Cullen Development Company was initially a party-plaintiff to this action. However, Respondents' Demurrer to the original *verified* complaint was *sustained without leave to amend* as to Cullen Development Company which waived/has forgone its right to appeal.

negotiating complex construction contracts with public agencies and obtaining all of the necessary financial backing.

Respondents represented the partnership, Cullen Development Company, and each of the Cullen partners as defendants in the underlying action for only a portion of its pendency. On or about June 3, 1987, all of the Cullen Development defendants in the underlying action *voluntarily substituted themselves as their own attorneys*. The reasons for the substitution were set forth in a declaration executed by Petitioner and filed in support of a motion to continue the June 16, 1987, trial date. In his declaration, Petitioner declared, *under penalty of perjury*, that the Cullen defendants' continued failure/refusal to pay in excess of $14,000 in attorneys' fees accrued as of February 1987 and their inability to pay for further attorneys' fees through trial necessitated the substitution.

On or about June 11, 1987, James T. Ford, then Presiding Judge of the Sacramento County Superior Court, denied the Cullen defendants' motion to continue the trial.

After waiving a jury trial, a court trial was held on June 16, 1987, against James Cullen and Cullen Development Company only. The Honorable James I. Morris presided. Although Petitioner had filed a voluntary petition for bankruptcy prepared by Robert Bardwill, Esq., in accordance with Chapter 11, Title 11, of the United States Code, Case No. 287-03434-A-11, U.S. Bankruptcy Court, Eastern District of California, he appeared with James Cullen and Cullen Development Company at the trial.[2] Petitioner was not only present at the June 16, 1987, trial, but assisted his brother, James Cullen, in his testimony. James Cullen testified at trial under oath and admitted the material allegations of the

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2. Cullen Development and James Cullen were not included in the bankruptcy for unknown reasons, although apparently they qualified.

Housing Development's amended complaint. Richard Cullen was not present and a default judgment was entered against him.

By order of the court dated June 16, 1987, judgment was clearly rendered in favor of the Housing Authority in the amount of $366,361.94, plus costs, and against James Cullen and Cullen Development Company. *On October 13, 1987, Judgment was entered in favor of the Housing Authority and against James Cullen and Cullen Development Company on the Housing Authority's complaint.*

On December 7, 1989, the bankruptcy stay was lifted by operation of law when Petitioner's bankruptcy petition was dismissed. Thereafter, the Housing Authority, resumed its complaint against Petitioner, doing business as Cullen Development Company, *although it had already obtained a judgment against the partnership for which Petitioner was legally liable*. Petitioner *elected* to pursue claims against the Housing Authority by way of a motion for leave to amend the cross-complaint, although his claims were indistinguishable from those of Cullen Development Company. Petitioner's motion to amend was denied on September 7, 1990.

On October 30, 1990, the Honorable Joe S. Gray granted the Housing Authority's motion for summary judgment on Petitioner's cross-complaint. Specifically, the court found that under the doctrine of collateral estoppel, the October 13, 1987, judgment against Cullen Development Company barred Petitioner's defenses to the Housing Authority's complaint, as well as his claims under the cross-complaint.

Subsequently, on February 13, 1991, the court rendered a verdict after a two-day trial on the underlying action against Petitioner which was stayed pending post-trial briefing on the Petitioner's collateral estoppel arguments until April 4, 1991. *On*

April 4, 1991, the court issued an order whereby the October 13, 1987, judgment against Cullen Development Company was held to bar Petitioner's claims and confirmed judgment against Petitioner.[3] This subsequent trial was unnecessary since the Housing Authority, by motion after the bankruptcy stay was lifted, could have had the judgment against Cullen Development Company made binding upon Petitioner under the provisions of California Code of Civil Procedure § 1908 through California Corporations Code § 15015. Neither Petitioner nor Respondents had any control of the less expeditious choice of relief by the Housing Authority.

Following entry of the second judgment, *on April 29, 1991*, Petitioner filed an original *verified* complaint for damages against Respondents on behalf of himself and Cullen Development Company. The complaint alleged four causes of action sounding in legal malpractice: negligence, intentional misrepresentation, breach of contract, and breach of legal ethics. Petitioner decided to file this action having consulted with two local attorneys on September 28, 1990, and October 2, 1990, who advised Petitioner that he *might* have a viable legal malpractice case against Respondents. Petitioner, however, at all times has been *in propria persona*.

On May 30, 1991, Respondents filed their demurrer to Petitioner's original complaint. Following a hearing on July 16, 1991, the court granted Respondents' demurrer to the complaint of Petitioner for negligence, intentional misrepresentation and breach of legal ethics, *with leave to amend*, based on the statute of

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3. A notice of appeal of the underlying action was filed by Petitioner on May 29, 1991. The California Court of Appeals for the Third Appellate District affirmed judgment against Petitioner on November 20, 1992. The Supreme Court of the State of California denied a petition for review on February 10, 1993.

limitations. As to the breach of contract cause of action, the court sustained the demurrer *with leave to amend* for failure to state whether the alleged contract was written or oral. The court sustained the demurrer to the complaint as to cross-complainant Cullen Development Company *without leave to amend*.

In a futile attempt to state facts sufficient to constitute a cause of action, Petitioner filed his *verified* first amended complaint on July 29, 1991, pursuant to the court's order. Petitioner filed a *verified* further amended first amended complaint on August 15, 1991, having omitted the cause of action for breach of contract. To avoid a formal motion and for the sake of expediency, Respondents' counsel, Henry W. Crowle, Esq., agreed to stipulate to allow the filing of this pleading by Petitioner.

On August 27, 1991, Respondents filed their demurrer to the further amended first amended complaint. On September 27, 1991, the court granted Respondents' demurrer, *without leave to amend*, on the basis that Petitioner's further amended first amended complaint failed to state facts to constitute *any cause of action* and ordered the action dismissed with prejudice with judgment of dismissal being entered thereon. It is from this order and judgment that Petitioner sought relief by way of appeal to the Court of Appeals of the State of California for the Third Appellate District.

Petitioner's notice of appeal was filed on November 20, 1991. The grounds for his appeal of the superior court's order and judgment of dismissal were substantially the same as presented to this Court, to wit: The superior court committed reversible error in determining that his cause of action for intentional misrepresentation was barred by the statute of limitations, citing California Code of Civil Procedure § 338. Petitioner also argued that the superior court erred in ruling that his cause of action for legal malpractice was barred in its entirety by the statute of limitations set forth in California Code of Civil Procedure § 340.6.

Finally, Petitioner appealed the superior court's decision on the grounds that California Code of Civil Procedure §§ 340.6 and 1049 directly conflicted with each other.

After briefing, oral argument was heard by the California Court of Appeals, Third Appellate District, on December 18, 1993. In an unpublished opinion filed on January 4, 1993, the court of appeals affirmed the Sacramento County Superior Court's order and judgment of dismissal.

The insightful California Court of Appeals for the Third Appellate District agreed with the Sacramento County Superior Court that Petitioner's cause of action for legal malpractice was barred by the statute of limitations, California Code of Civil Procedure § 340.6, having commenced to run on October 13, 1987, the date Petitioner suffered injury to his interests. The court of appeals also rejected Petitioner's fraud (intentional misrepresentation) claim concluding the *alleged* fraud in the nondisclosure of Respondents' alleged failure to comply with the tort claims statutes was not the legal cause of Petitioner's injury, but the alleged abandonment before trial by Respondents and the resulting adverse judgment. In any event, the court concluded the statute of limitations had run.

On January 19, 1993, Petitioner filed a petition for rehearing. Petitioner's stated grounds for rehearing were that the court of appeals had failed to differentiate a partnership cause of action from an individual cause of action as it related to the statute of limitations for legal malpractice, California Code of Civil Procedure § 340.6, and that the court of appeals' decision as to his fraud claim did not address all of the construction contracts.

On February 1, 1993, the court of appeals filed an unpublished opinion denying Petitioner's petition for rehearing. The court of appeals declined to address Petitioner's first ground for rehearing

having specifically done so in its opinion filed on January 4, 1993. As for the second basis for Petitioner's petition for rehearing, the court of appeals concluded that Respondents' alleged failure to disclose that they had not filed government tort claims did not prevent Petitioner from pursuing his claims for breach of contract on the three (3) construction contracts.

On March 31, 1991, the California Supreme Court denied Petitioner's petition for review.

Petitioner now requests that this Court issue an order granting a writ of certiorari to review the California Supreme Court's decision denying his petition for review. This Court has, at least preliminarily, indicated its intent to deny Petitioner's request having denied his petition for writ of certiorari in the underlying action on June 28, 1993,[4] as well as by its ruling in *Laird v. Blacker,* 61 U.S.L.W. 3418.

SUMMARY OF ARGUMENT

Assuming, *arguendo,* proper jurisdiction, the lower court correctly determined that Petitioner's action for legal malpractice, which included his cause of action for fraud (intentional misrepresentation), was barred by California Code of Civil Procedure § 340.6, the statute of limitations for legal malpractice actions, Petitioner having suffered "actual injury" by reason of the adverse judgment against him both individually and as a managing and qualifying partner of Cullen Development Company on October 13, 1987. The bar imposed by § 340.6, which was validly enacted and reasonable, did not deprive Petitioner of his day in court contrary to the concepts of due process and equal protection.

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4. *See* Appendix A to this brief in opposition, p. 1a.

Petitioner's contentions that he suffered no actual injury individually by reason of the October 13, 1987, adverse judgment on Cullen Development Company's cross-complaint is misplaced. The weight of authority recognizes that a partnership is an association of individuals, not an entity. Accordingly, Petitioner, as managing and qualifying partner of Cullen Development Company, was bound by the October 13, 1987, judgment.

REASONS FOR DENYING THE WRIT

I.

CORRECTIONS TO MISSTATEMENTS OF FACT.

Many factual assertions in the petition are inaccurate and/or unsupported by the record below. While some of the inaccuracies are inconsequential, others concern matters described by Petitioner as "critical," such as the declaration filed in support of the defense motion to continue the June 16, 1987, trial date:

> On June 8, 1987, Trainor called petitioner, who was residing in Arizona, stating that the court would require a Declaration from petitioner in order to hear a Motion to Continue the scheduled trial date. Trainor dictated the contents of said Motion (dated June 8, 1987) that Trainor requested. Two critical statements in the Declaration were that petitioner allegedly owed Trainor legal fees, and that, petitioner desired to be placed, In Pro Se. *Each of these statements were fabricated by Trainor to delay the pending trial date.*
>
> At the time of this Declaration, Trainor knew that the firm was paid in full, with extra monies

> still on retainer. (Petition, p. 8.) [Emphasis in original.]

Petitioner's description of the events suggests that he drafted the declaration as Respondents dictated the contents over the telephone. Petitioner does not explain why, if he knew that the statements made in the declaration were untrue, he nevertheless signed the declaration. Moreover, Petitioner's contention that the "two critical statements" were fabricated raises questions about the credibility of representations he makes in his petition.

In his declaration, Petitioner swore, under penalty of perjury, that he was indebted to Respondents for approximately $14,000 and had not been able to pay them for several months. He also stated that he and his co-defendants had attempted to work out a payment schedule with Respondents. In addition, Petitioner acknowledged a debt to Respondents in his second bankruptcy action.

Viewed in the light of admissions made by Petitioner in other proceedings, his contention that the statement concerning unpaid legal fees was a fabrication is not credible and a fabrication itself. His assertion that Respondents fabricated the statement that Petitioner wished to represent himself is even less credible.

II.

PETITIONER HAS NOT BEEN DEPRIVED OF HIS RIGHT TO DUE PROCESS.

A. Legal Malpractice Claim.

Petitioner presents to this Court the same arguments, with only the addition of a few legal authorities that were summarily rejected by the State of California's highest court. He contends that

California's statute of limitations governing actions for legal malpractice is unconstitutional because it is vague as to the meaning of "actual injury." In particular, Petitioner argues that he did not suffer actual and appreciable harm within the meaning of the statute by reason of the adverse judgment rendered *after* the June 16, 1987, trial because the Housing Authority action was stayed with respect to his individual liability and his cross-complaint against the Housing Authority. In essence, Petitioner claims that the harm he suffered while wearing his "partnership hat" cannot be considered harm to him while wearing his "individual hat."

If the statute was vague, Petitioner's appeal to the California Supreme Court presented that court with an opportunity to further interpret the statute's language.[5] It declined to do so. Regardless, the record demonstrated that Petitioner has not been deprived of his due process rights.

California Code of Civil Procedure § 340.6 provides:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission,whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period

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5. Although Petitioner's constitutional arguments were not presented to the California Supreme Court, it was free to decide the issues *sua sponte*.

shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four-year limitation; and

(4) The plaintiff is under a legal or physical disability which restricts the plaintiff's ability to commence legal action.

(b) In an action based upon an instrument in writing, the effective date of which depends upon some act or event of the future, the period of limitations provided for by this section shall commence to run upon the occurrence of such act or event. Leg. H. 1977, ch. 863.

In its tentative ruling, the superior court's decision cited California's Third District Court of Appeals' decision in *Johnson v. Simonelli*, 231 Cal. App. 3d 105 (1991) in support of its finding that the statute of limitations had expired as to Petitioner's legal malpractice action. The issue in *Johnson v. Simonelli, supra*, was *when* does a cause of action for legal malpractice accrue? The court of appeals succinctly stated at page 109:

> The statute of limitations in a legal malpractice action does not begin to run until the client discovers, or should have discovered, the attorney's negligence and the client has *sustained actual and appreciable harm.* [Emphasis added.]

Budd v. Nixen, 6 Cal. 3d 195, 200 (1971); (98 Cal. Rptr. 849); *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 194 (98 Cal. Rptr. 837) (1971); *Robinson v. McGinn,* 195 Cal. App. 3d 66, 73 (240 Cal. Rptr. 423) (1987).

The *Johnson* court further held at pp. 110-111, that the statute of limitations commences "when *plaintiff sustains actual injury, not when said injury becomes irremediable."*

The conclusion of the Third District Court of Appeals in *Johnson v. Simonelli, supra,* is well-founded in California Law. The California Supreme Court held in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra,* and *Budd v. Nixen, supra*, that the client's cause of action for legal malpractice accrues upon the discovery of some actual injury resulting from the alleged negligence.

> The cause of action arises, however, before the client sustains *all, or even the greater part, of the damages* occasioned by his attorney's negligence. [citations omitted.] Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue.
>
> Indeed, once having discovered his attorney's negligence and having suffered *some damage,* the client *must institute his action within the*

> *time prescribed in the statute of limitations or he will be barred from thereafter complaining of his attorney's conduct.* [Emphasis added.]

Budd v. Nixen, supra, 6 Cal. 3d at 201.

The "actual and appreciable harm" rule is also applicable to the one-year statute of limitations for tort actions set forth in California Code of Civil Procedure § 340 (*Miller v. Lakeside Village Condominium Assn.*, Cal. App. 4th 1611, 1622-1623 (1991)). This rule avoids "[p]unishing the plaintiff, who, having acted reasonably in not prosecuting a lawsuit for insignificant damages, later suffers more substantial harm" (*Miller, supra,* at 1622, *quoting Derose v. Carswell,* 196 Cal. App. 3d 1011, 1021-1022 (1987)).

The California Supreme Court in *Laird v. Blacker,* 2 Cal. 4th 606 (1992), held that "[u]nder section 340.6, the statute of limitations for legal malpractice action commences on entry of *adverse judgment or final order of dismissal*" in the underlying action on which the malpractice is based (*Laird, supra,* at 615). This Court recently denied a petition for writ of certiorari of the *Laird* decision. (*See* 61 U.S.L.W. 3418.)

Applying the foregoing decisions, Petitioner was deprived of his theoretical ability to recover by the superior court's ruling at the trial on June 16, 1987. The subsequent finding of collateral estoppel on September 7, 1990, was based on this ruling. Petitioner's Chapter 11 Bankruptcy action only suspended the application of the June 16, 1987, ruling. The point in time that collateral estoppel was "formalized" by court order is not the time of accrual of a cause of action for legal malpractice.

B. Cullen Development Company Was Not A Separate Legal Entity From Its Partners.

Petitioner suffered "actual" damage by the adverse judgment against Cullen Development Company and its partners, exclusive of his bankruptcy action or the underlying cross-complaint. As a matter of law, that adverse judgment against the partnership could have been executed against Petitioner by virtue of his capacity as *managing* and *qualifying partner,* whereby he is jointly liable for a judgment against the partnership (Corporations Code § 15015;[6] Code of Civil Procedure § 369.5(b), formerly Code of Civil Procedure § 388(b))[7].

Furthermore, the manner by which the Housing Authority asserted its claim against Petitioner is inconsequential to the issue of when his alleged damages accrued. Thus, although the Housing Authority sought unnecessarily to proceed against Petitioner individually[8], it is of no consequence to when Petitioner sustained or incurred "actual or appreciable harm" or damage for purposes of

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6. California Corporation Code § 15015 provides: "All partners are liable: (a) Jointly and severally for everything chargeable to the partnership under §§ 15013 and 15014; (b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

7. Former California Code of Civil Procedure § 388(b), now California Code of Civil Procedure § 369.5(b) provides: "(b) A member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on the member as an individual, whether or not the member is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against the member based on the member's personal liability may be obtained in the action, whether the liability is joint, joint and several, or several."

8. The subsequent trial against Petitioner was unnecessary since the (Cont'd)

malpractice, since this occurred at the time of the adverse judgment on October 13, 1987, whereby collateral estoppel was obtained.[9]

Again, the manner by which the Housing Authority sought its remedy is inconsequential to the issue of when damages accrued.

Since Petitioner acknowledged in his original *verified* further amended first amended complaint that malpractice accrued as of the date of entry of the June 16, 1987, adverse judgment as to him, both individually and as managing and qualifying partner of Cullen Development Company, regarding the underlying complaint and cross-complaint, the instant action is time barred.

Petitioner's contention that he suffered no injury as an individual by virtue of the entry of the June 16, 1987 adverse judgment against Cullen Development Company, thus lacks merit

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(Cont'd)
Housing Authority, by motion after the bankruptcy stay was abated, could have had judgment against Cullen Development Company made binding upon Petitioner pursuant to California Code of Civil Procedure § 1908.

California Code of Civil Procedure § 1908(2)(b) provides in pertinent part: "At any time prior to a final judgment, as defined in § 577, a determination of whether the judgment, verdict upon which it was entered, or a finding upon which it was entered is to be binding upon a nonparty pursuant to this subdivision or whether such nonparty is entitled to the benefit of this subdivision may, on noticed motion of any party or any nonparty that may be affected by this subdivision, be made in the court in which the action was tried or in which the action is pending on appeal. If no such motion is made before the judgment becomes final, the determination may be made in a separate action. If appropriate, a judgment may be entered or ordered to be entered pursuant to such determination."

9. In actuality, Petitioner's "damages" flow from when he claims Respondents allegedly abandoned him on June 3, 1987.

as it assumes that Cullen Development Company is a distinct unit, separate from its members. In *Reed v. Industrial Accident Com.*, 10 Cal. 3d 191 (1937), the California Supreme Court held:

> [A] partnership is not considered an entity, but an association of individuals.

See, First Nat. T & S. Bank v. Industrial Acc. Com., 213 Cal. 322, 331 (2 P.2d 347, 78 A.L.R. 1324); 9 Cal. L. Rev. 1190. *Reed v. Industrial Accident Com.*, 10 Cal. 3d at 192-193.

The same conclusion as stated above was reached by the California Supreme Court in *Marshall v. International Longshoremen's & Warehousemen's Union*, 57 Cal. 2d 781, 783 (1962), wherein it was stated:

> [U]nder traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of partnership business, and the agents of the partnership acting as agents for all of the partners.

The Uniform Partnership Act generally follows the aggregate, not entity theory (Witkin, *Summary of California Law, "Partnership"*, section 15, p. 412 (9th Ed. 1989). Thus, California Corporations Code § 15025(1) provides "A partner is a co-owner with the other partners of specific partnership property held as a tenant in common."

The cases cited by Petitioner are inapposite to the case at bench. For example, in *Evans v. Galardi*, 16 Cal. 3d 300 (1976), at issue was whether a judgment creditor could reach partnership assets in satisfaction of his judgment against limited partners

named as individuals in the action. The California Supreme Court held that under the Uniform Limited Partnership Act, a limited partner has no property interest in the specific partnership assets by virtue of his status as a limited partner, and such assets are not available to satisfy a judgment against a limited partner in his individual capacity. Clearly, the *Evans* case is distinguishable from the instant one. Not only does the *Evans* decision not address the issue presented in Petitioner's petition, but Cullen Development Company was a *general partnership,* not a limited one, of which Petitioner was the managing and qualifying general partner.

The California Supreme Court's decision in *Fazzi v. Peters*, Cal. 2d 590 (1968) is likewise distinguishable in that Petitioner was joined as a defendant in the underlying action as well as Cullen Development Company.

Finally, important public policy considerations defeat recognition of a partnership "entity" theory in the case. The California State Legislature enacted statutes of limitations to promote justice by preventing surprises through the revival of claims that have been allowed to languish until evidence has been lost, memories faded, and witnesses have disappeared. Witkin, *California Procedure, "Actions,"* section 309, p. 338 (3rd Ed. 1985). It did not intend to expose attorneys to liability ad infinitum, and, therefore, enacted § 340.6. This Court has implicitly agreed with the California Supreme Court's interpretation of this statute as set forth in the *Laird* decision by its denial of a petition for writ of certiorari.

C. Intentional Misrepresentation Claim.

Petitioner contends that he was deprived of due process by virtue of the statute of limitations barring his cause of action for fraud (intentional misrepresentation).

The Third District Court of Appeals for the State of California rejected Petitioner's fraud claim because it was not a legal cause of his injuries.[10] As discussed above, Petitioner's interests were allegedly injured when the judgment was entered against Cullen Development Company on the underlying Housing Authority complaint and against Cullen Development Company on its cross-complaint. On that date, the statute of limitations accrued on Petitioner's legal malpractice claim based on Respondents' alleged failures to defend the Housing Authority action *and* Petitioner's malpractice claims regarding the underlying cross-complaint.

Petitioner, however, contends that he could have brought various meritorious tort causes of action on his cross-complaint "but for" Respondents' alleged failure to comply with the Government Tort Claims Act. Accordingly, Petitioner further contends that the statute of limitations was tolled by reason of Respondents' alleged failure to disclose their alleged noncompliance with the Tort Claims Statute.

As the court of appeals stated:

> The judgment entered in favor of the Housing Authority adjudicated the merits of Cullen's [Appellant's] cross-complaint against the Housing Authority *regardless of theory of recovery*. . . .

In reaching this conclusion, the court of appeals reasoned that had Respondents timely filed a tort claim and amended the cross-complaint to advance the sundry tort theories, the October 13, 1987, judgment would have been entered in any event, thereby barring any subsequent action on the tort claims.[11]

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10. Appendix C to Petition, p. C-11.

11. Appendix C to Petition, p. C-21.

Assuming, *arguendo*, Petitioner's cause of action for intentional misrepresentation sounds in other than legal malpractice, *i.e.*, fraud, aside from the fact that it is not properly pled, it is time-barred by the provisions of California Code of Civil Procedure § 338.

California Code of Civil Procedure § 338 provides that within three years:

> (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of facts constituting the fraud or mistake.

Petitioner clearly asserted, as demonstrated above, that as of June 16, 1987, damages accrued and there was knowledge of the alleged fraud. In particular, Petitioner asserted in his declaration in support of his motion for leave to amend the cross-complaint, dated September 4, 1990, *under penalty of perjury,* that he discovered on or before June 16, 1987 that his case was never prepared for trial, requiring him to pursue bankruptcy. Even if Petitioner was not aware of *all* of the alleged failures, including the alleged failure to file a claim under the Government Tort Claims Act, this assertion is more than sufficient to commence the statute of limitations for fraud (California Code of Civil Procedure § 338, *supra*) and legal malpractice (California Code of Civil Procedure § 340.6, *supra*).

The claim for fraud should be denied. Respondents' alleged concealment was not the legal cause of Petitioner's injury, but the alleged abandonment before trial and the subsequent entry of adverse judgment on October 13, 1987. It was on that date the statute of limitations (§ 340.6) began to run. This was the implicit conclusion of the Third District Court of Appeals for the State of

California. (*See, Stoll v. Superior Court*, 9 Cal. App. 4th 1363 (1992)). Nevertheless, further assuming, *arguendo,* Petitioner's cause of action sounds of fraud rather than in legal malpractice, it is barred by California Code of Civil Procedure § 338.

CONCLUSION

Based upon all of the foregoing authorities, noting in particular the lack of jurisdiction of this Court, Petitioner's petition for writ of certiorari should be denied. The bar imposed by validly enacted and reasonable statutes of limitations such as the one at issue does not deprive a litigant of his day in court in derogation of due process. Petitioner, having slept on his rights cannot now be heard to complain.

Respectfully submitted,

HENRY W. CROWLE
Counsel of Record
MEMERING, VARANINI, CROWLE
& TRIMBLE
Attorneys for Respondents
Trainor, Robertson, Smits & Wade
and Charles Trainor, Stuart Smits,
William Davis, Dave Robertson
and Gary Funamura

APPENDIX A — LETTER FROM WILLIAM K. SUTER OF THE SUPREME COURT OF THE UNITED STATES DATED JUNE 28, 1993

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 28, 1993

Mr. Brenton A. Bleier
1001 "G" Street
Suite 101
Sacramento, CA 95814

Re: Mark T. Cullen
v. Housing Authority of Sacramento County
No. 92-1765

Dear Mr. Bleier:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

s/ William K. Suter
William K. Suter, Clerk

[stamped]
RECEIVED
JUL 1 1993
LAW OFFICES OF BRENTON A. BLEIER